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AUTHOR Uerling, Donald F.
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ABSTRACT

Legal issues in public use of educational facilities and property are examined in this paper, which focuses on the balance between government authority and individual rights of association and expression protected by the First and Fourteenth Amendments. The Supreme Court's use of forum analysis to determine whether the government's interest in limiting property use outweighs the interest of the public party as established in Perry Education Association v. Perry Local Educators' Association and Cornelius v. NAACP Legal Defense and Education Fund is discussed. Three types of forums are described: the traditional public forum; the public forum created by government designation; and the nonpublic forum. Fundamental issues--the nature of the activity, relevant forum, and restrictions to access--are also described. As a general rule, public education facilities should be available for appropriate public use. However, educational administrators should establish narrow definitions and equitable granting of access, implement clear policies and consistent practices, and recognize the impermissibility of viewpoint-based discrimination. (LMI)

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NOLPE Annual Convention 1991

CONTROLLING ACCESS TO PUBLIC EDUCATIONAL FACILITIES: THE NATURE OF THE FORUM

Donald F. Uerling, J.D.,Ph.D.
Associate Professor of Educational Administration
University of Nebraska-Lincoln

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Introduction

Various organizations, groups, and individuals request access to public educational facilities, seeking to use the facilities for a variety of activities. While governing boards and administrators generally want to make public facilities available for public use, problems sometimes arise when it seems that the nature of the group or proposed activity is likely to be controversial or inconsistent with the purposes of the institution or character of the property. If access is denied and those who sought access turn to the courts for redress, a balance must be struck between government authority and individual rights of association and expression protected by the First and Fourteenth Amendments. The purpose of this paper is to explore the Constitutional principles that pertain to this topic.

Forum Analysis

The Supreme Court has adopted a forum analysis as a means of determining when the government's interest in limiting the use of its property to its intended purposes outweighs the interest of those wishing to use the property for other purposes. The Court set out the basic framework for this analysis in Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) and then further explained that framework in Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788 (1985).

Nothing in the Constitution requires the government freely to grant access to all who wish to exercise rights to free speech and assembly on government property without regard to the nature of the property or to the disruption that might be caused. The government, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated. Cornelius at 799-800.

No one has an absolute constitutional right to use all parts of a school building or its immediate environs for unlimited expressive purposes. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." Perry at 44.

In Perry the Court identified three types of forums -- the traditional public forum, the public forum created by government designation, and the nonpublic forum. Cornelius at 802.

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Traditional Public Forum

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activities are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposed of assembly, communicating thoughts between citizens, and discussing public questions." ... In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. ... The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Perry at 45 (citations omitted).

Designated Public Forum

> A second category consists of public property which the state has opened for use by the public as a place for expressive activity. The Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. ... Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Perry at 45-46 (citations omitted).

Nonpublic Forum

> Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." ... In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposed, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. Perry at 46 (citations omitted).

Fundamental Issues to be Addressed

When government restrictions on access to public facilities are challenged as being violations of Constitutional rights, three fundamental issues must be addressed: (1) Is the activity for which access is sought the kind of activity that is protected by the First Amendment? (2) What is the nature of the relevant forum? (3) Given the nature of the forum, do the restrictions on access meet the pertinent constitutional test? Cornelius at 797. While the legal principles enunciated in Perry and Cornelius seem relatively straightforward, the application of these principles to the specific facts of a given case can be quite complicated.

The Nature of the Activity

If the activity for which access is sought is not the kind of expression or assembly that is protected by the First Amendment, then there would be no Constitutional restrictions on controlling access. Cornelius at 797. It is not the purpose here to consider the kinds of activities that might be protected; it can be noted, however, that the list is long.

The Nature of the Forum

As the analytical framework set out in Perry makes clear, the justification required to control access and use differs significantly depending on the nature of the relevant forum. Therefore, those seeking to exercise such control over educational facilities or immediate environs need to understand what constitutes a "traditional public forum," a "designated public forum," or a "nonpublic forum."

The first step is to define the forum at issue. It may be a place, such as a building or its environs, or it may be a means of communication, such as a mail system or a newspaper. In defining the forum, the Court has focused on the access sought by the speaker. Cornelius at 800-01.

Traditional public forum. Neither the places nor the channels of communication in public educational facilities are considered to be a "traditional public forum." Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 267 (1988); Widmar v. Vincent, 454, U.S. 263, 267-68, n. 5 (1981); Texas State Teachers Ass'n v. Garland Indep. School Dist, 777 F.2d 1046 (5th Cir. 1985), aff'd, 479 U.S. 801 (1986). The places that "by long tradition or by government fiat have been devoted to assembly and debate," Perry at 45, probably would be owned or operated by other units of government.

Designated public forum. On the other hand, courts have often found that a public educational property or activity has become a "designated public forum." Such a public forum may be

created by government designation of a place or channel of communication for indiscriminate use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects. Cornelius at 802; Perry at 45-46, n. 7, and at 47.

Two often-cited examples of designated public forums in the context of public eduction are the state university meeting facilities made generally available to students in Widmar v. Vincent, 454 U.S. 263 (1981) and the provision for citizens to discuss school affairs at open school board meetings in Madison Joint School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976).

As noted in Cornelius and Perry, some designated public forums may be open to anyone to discuss anything, while other forums may be created for a limited purpose, Perry at 46, n. 7, such as for the use of certain people, e.g., Widmar, supra, (university students) or for the discussion of certain topics, e.g., Madison, supra, (school board business). Some courts have identified such a subcategory of the designated public forum as a "limited public forum." See, e.g., Travis v. Owego-Apalachin School Dist., 927 F.2d 688, 692 (2nd Cir. 1991); Slotterback v. Interboro School Dist., 766 F.Supp. 280, 292 (E.D.Pa. 1991). This distinction is not universally recognized, however, and both "designated public forum" and "limited public forum" are sometimes used to represent the same concept. See, e.g., Cornelius at 813-833 (Blackmun, J., dissenting).

Nonpublic forum. Any public property or channel of communication that is not by tradition or designation a forum for public communication is a nonpublic forum. Perry at 46. Educational facilities may be deemed to be public forums only if authorities have by policy or practice opened those facilities for indiscriminate use by the general public or for some more limited purpose. If the facilities have instead been reserved for other intended purpose, communicative or otherwise, then no public forum has been created. Hazelwood at 267.

The Restrictions on Access

The extent to which the government can control access depends on the nature of the relevant forum. As noted in Perry and Cornelius, there are important differences in the restrictions that may be imposed on access to public forums, designated forums, and nonpublic forums.

Public forum. For the government to enforce a content-based exclusion in a traditional public forum or a designated public forum, it must show that the regulation is necessary to serve a compelling government interest and that it is narrowly drawn to achieve that end. The government may also enforce reasonable

regulations of the time, place, and manner of expression, as long as the regulations are content-neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. Perry at 46; see also Cornelius at 800.

Although boards and administrators have little control over the existence of a "traditional public forum," government may still exercise some control over activities in such a forum that would cause material disruptions of the educational process or substantial invasions of the rights of others. See, e.g., Grayned v. City of Rockford, 408 U.S. 104 (1972); see also Police Department of Chicago v. Mosley, 408 U.S. 92 (1972). In the instance of a "designated forum," institutional officials would have the authority to regulate expressive activities that violated reasonable rules or interfered with the educational process. Widmar at 277.

Whether regulations of time, place, and manner are reasonable depends on the nature of a place and the pattern of its normal activities. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. At least in the context of a public forum, the regulation must be narrowly tailored to further the state's legitimate interests. Grayned at 116-17.

Nonpublic forum. In contrast, the government may restrict access to a nonpublic forum as long as the restrictions are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. Cornelius at 800. Also, reasonable time, place, and manner regulations are permissible in a nonpublic forum. Perry at 46.

Another important distinction is that control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. A speaker may be excluded from a nonpublic forum if he or she is not a member of the class of speakers for whose benefit the forum was created or if he or she wishes to address a topic not encompassed within the purpose of the forum; however, the government cannot deny access to a speaker solely to suppress the point of view the speaker expresses on an otherwise includible subject. Cornelius at 806. While distinctions based on subject matter or speaker identity may be impermissible in a public forum, they are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property or channel of communication. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose that the forum at issue serves. Perry at 49.

Limited Public Forums or Nonpublic Forums

The Supreme Court has stated that a designated public forum can be created for a limited purpose, such as for the use of certain speakers or for the discussion of certain subjects. Cornelius at 802; Perry at 46, n. 7. The Court has also stated that control of access to a nonpublic forum can be based on speaker identity and subject matter, so long as the distinctions are reasonable. Cornelius at 806; Perry at 49.

There does appear to be an operational difference between the two concepts. To restrict access to a public forum, a finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functions of the forum is required. To restrict access to a nonpublic forum, the government's decision need only be reasonable; it need not be the most reasonable or the only reasonable limitation. In contrast to a public forum, in a nonpublic forum there is no requirement that the restriction be narrowly tailored or that the government's interest be compelling. The reasonableness of the restriction on access is simply assessed in the light of the purpose of the nonpublic forum and all the surrounding circumstances. Cornelius at 808-09.

For those boards and administrators of educational institutions who want to maintain a neutral posture on controversial issues, the difference between a public forum and a nonpublic forum is important.

> Although the avoidance of controversy is not a valid ground for restricting speech in a public forum, a nonpublic forum by definition is not dedicated to general debate or the free exchange of ideas. The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose.

Cornelius at 811.

Two examples of the application of this principle in nonpublic forums are offered by way of illustration. A school board's desire to keep politics off school grounds and to avoid becoming embroiled in political controversy was thought to be an adequate justification for denying the Student Coalition for Peace access to an athletic field to hold a Peace Fair. No viewpoint discrimination was found, because the school had offered access to an auditorium. Student Coalition for Peace v. Lower Merion School, 776 F.2d 431 (3rd Cir. 1985). However, a school policy that prohibited the Atlanta Peace Alliance from presenting negative information about military service at a school-sponsored Career Day was viewed as being both unreasonable and a form of viewpoint discrimination. "[W]hile avoiding controversial issues justifies prohibiting speakers from discussing the morality of war or defense spending, it does not

justify excluding bona fide negative facts which are relevant to the requirements or benefits of a specific job, including one in the military." Searcy v. Harris, 888 F.2d 1314 (11th Cir. 1989).

Given the differences in the burden of justification that the government must carry, whether the forum is public or nonpublic is an important issue. The government is not required either to create a "designated public forum" or to hold it open indefinitely. But if government chooses to create, for example, a "limited public forum" for certain speakers or certain subjects, then it should do so by design, not by accident.

A public forum is not created by inaction or by permitting limited discourse, but only by intentionally opening an otherwise nonpublic forum for public discourse. The Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum. The Court will not find that a public forum has been created in the face of clear evidence of a contrary intent, nor will it infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity. For example, if the government has consistently required that permission must be granted for access, and the granting of the requisite permission is not merely ministerial, then that is evidence that the government did not intend to create a public forum. Cornelius at 802-05. See also Perry at 46-48.

The Supreme Court has been divided on its approach to determining whether a limited public forum has been created. The distinction between exclusions that help define the contours of the forum and those that are imposed after the forum is defined have been troublesome. If prior government prohibitions of certain speakers or certain subjects are taken as evidence that there was no intent to create a limited public forum, then the forum may be defined as nonpublic and any regulations of speakers or content will be subjected to only a "reasonableness" inquiry. If, however, it is found that a limited public forum has been created, then any subsequent restrictions based on speaker identity or subject content would be judged according to stricter scrutiny. While there may be only a semantic distinction between the two ways in which limited-purpose forums can be characterized, the two options do carry with them different standards of review. U. S. v. Kokinda, -- U.S. --, 110 S.Ct. 3115, 3132 (1990) (Brennan, J., dissenting); see also Cornelius at 825 (Blackmun, J., dissenting)

The determination of whether public educational facilities constitute a public forum or a nonpublic forum is based on several factors. First is government intent; school policies and practices, as well as the nature of the property and its compatibility with expressive activity are relevant. Second is

the extent of use granted, whether facilities are open to all comers or whether access is limited by well-defined standards tied to the nature and function of the forum. Third is consistency in granting or refusing access to similarly situated speakers. Gregoire v. Centennial School Dist., 907 F.2d 1366 (3rd Cir. 1990), cert. denied, 111 S.Ct. 253.

In Gregoire, a school had opened its facilities for general use by community groups, but had denied access to a religious organization. The court held that the school had not retained a closed forum. Of particular significance in this case was the creation of a "limited open forum" immediately after school for use by students in accordance with the Equal Access Act, 20 U.S.C. sections 4071 et seq. The court based its holding on the fact that the same religious program denied access in the evening could have been presented at the "limited open forum" in the afternoon. This case raises a major issue -- whether schools that provide a "limited open forum" in accordance with the Equal Access Act thus create a "limited public forum" for purposes of Constitutional forum analysis.

Intent is a critical factor in the forum calculus. Planned Parenthood v. Clark County School Dist., 941 F.2d 817 (9th Cir. 1991) upheld the right of a school to refuse to publish advertisements for the services of Planned Parenthood in school newspapers, yearbooks, and athletic programs. The affirmative intent of school authorities to retain editorial control and responsibility over all publications and advertising disseminated under its auspices was clearly evidenced by written policies and consistent practices. Thus, the publications were not public forums. The school rejected the advertisements to maintain a position of neutrality on the sensitive and controversial issue of family planning, which was found to be a reasonable decision and not an effort at viewpoint discrimination.

It may be the policy or practice of a school to maintain a public forum for general community use. Grace Bible Fellowship v. School Admin. Dist. 5, 941 F.2d 45 (1st Cir. 1991) held that by allowing many other community organizations to use school facilities, the school district had created a public forum from which it could not exclude a religious organization because of the content of its speech. The school policies reflected an intent to make facilities generally available for the community, and as a practice no group other than religious organizations had ever been excluded.

Content or Viewpoint Discrimination

An important difference to be noted is that between a content-based exclusion and a viewpoint-based exclusion. Under certain circumstances a content-based exclusion might be permissible in either a "limited public forum" or a "nonpublic

forum," but a viewpoint-based exclusion is not permissible in either instance. Two quotes are offered by way of illustration.

> Thus, in a limited public forum, government is free to impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre.

Travis v. Owego-Apalachin School Dist., 927 F.2d 688, 692 (2nd Cir. 1991).

> Thus, as with any other nonpublic forum, once the School Board determines that certain speech is appropriate for its students, it may not discriminate between speakers who will speak on the topic merely because it disagrees with their views.

Searcy v. Harris, 888 F.2d 1314, 1324 (11th Cir. 1989)

Conclusion

In the context of government control of access to public educational facilities, several general guidelines are suggested.

a. As a general rule, public educational facilities should be made available for appropriate public use; however, such access should be defined narrowly and must be granted equitably.

b. The uses for which public educational facilities will be made available should be stated clearly in policy, and the policy should be followed consistently in practice.

c. If the intent is to create a "designated public forum," then it should be limited to certain speakers or certain topics, rather than made available to the general public for indiscriminate use. But once that limited public forum has been created, governing boards and administrators must be aware of the resulting limitation on their authority and control.

d. If the intent is to retain a "nonpublic forum," then reasonable standards must be established for determining the people and the topics for which access will be allowed, and permission to use the forum should be granted only in those instances where the standards have been clearly met. The government's intent to retain control over the use of its property and channels of communication must be clear.

e. Reasonable time, place, and manner restrictions can and should be enforced.

f. Whatever the type of forum at issue, viewpoint-based discrimination is not permissible. Be prepared to hear all sides of any issue appropriate for the forum.